Comment on Recent Decisions

CRIMINAL PROCEDURE—CUMULATIVE SENTENCES—POWER OF COURTS.—The defendant was arraigned on five informations for robbery by means of a deadly weapon, and pleaded guilty to them all. The cases were conducted as one case. The record in each case shows only a sentence of fifty years imprisonment, without further specification. *Held*, the sentences are to run cumulatively. *State v. Harris* (Mo. 1935) 81 S. W. (2nd) 319.

The crux of the matter is the construction of R. S. Mo. (1929) 4456, which reads as follows: When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction.

The Court approves the decision in *State ex rel. v. Breuer*, (1924), 304 Mo. 381, 264 S. W. 1, which clearly repudiates the reasoning of *Ex parte Myers*, (1869), 44 Mo. 279, and all cases holding similarly. But the facts in the case at hand do not warrant absolute reliance on precedent, and the court wisely relies on the statute itself as the basis of its conclusion.

In the *Myers* case, the defendant had been convicted and was serving his sentence when an effort was made to prosecute him upon a new, entirely different indictment. The Court held that the judicial power to impose sentence rested solely upon statutory authority, and the section quoted did not furnish a basis for assessing a punishment to run subsequent to one on which the defendant was at the time imprisoned.

The *Breuer* case goes into a full and complete discussion of the power of the state to impose sentences, and after a long and careful review of early English and American cases, especially New York cases involving the act on which the Missouri statute was modeled, reached the conclusion that judicial authority in the matter does not rest solely upon legislative enactment, and therefore, that the statute in question, although it limits the court to cumulative sentences in the circumstances set forth, leaves the residue of judicial authority unimpaired. 10 St. L. L. Rev. 149. Such seems to be the established rule at the present time. *State ex rel. v. Rudolph.* (Sup. Ct. Mo., 1929), 17 S. W. (2nd) 932; *State v. Williams*, (Sup. Ct. Mo., 1928), 6 S. W. (2nd) 915. In the *Breuer* case, the second prosecution, with which the Supreme Court refused to interfere by writ of prohibition was based upon a charge instituted at a time when the defendant was before an appellate court, seeking reversal of a prior conviction.

Clearly, the principal case involves a factual background entirely distinct from the other cases. There, the question presented was whether the statute limited the court in the imposition of cumulative sentences to the described circumstances. Here, the facts plainly bring the case within the scope of the statute, and the question is one of application only.

A point of appellate procedure also is involved in this case, the Supreme Court deciding that it had the power to enter the proper directions for the disposition of the cumulative sentences. Although the case was remanded on

other grounds, the Court's dictum is completely contrary to the usual Missouri practice of remanding every criminal case involving error or omission, the higher court assuming no power to do what the trial court should have done originally. Even in cases of the sort discussed here, despite R. S. Mo. (1929) 3765, giving the Supreme Court power to correct judgments erroneous as to time or place of imprisonment, the general practice has been to send the record back to the trial court, there to be amended to conform to the construction of the statute as laid down by the Supreme Court. *State v. McFadden,* (1925) 309 Mo. 112, 274 S. W. 354. If the dictum in the principal case is followed in future opinions, the Missouri courts will have abandoned the traditional attitude of the past, and be embarked upon the more rational and progressive tendency apparent in modern opinions on criminal procedure.

W. H. M., '36

DOWER—EMINENT DOMAIN—EQUITABLE CONVERSION—RECONVERSION.—The city of New York condemned a portion of appellant's property and awarded him $53,258. His wife, claiming dower, filed notice of a lien on one-third of the award and this sum was set aside to her. The husband appealed. *Held,* in a 3 to 2 decision, that the inchoate right of dower is not such an interest in land taken by eminent domain as to entitle the wife to have a part of the award set aside for her benefit in case she survives her husband. *In re Cropsey Avenue, in City of New York* (1935) 278 N. Y. Supp. 815.

The instant case is of special significance because it is a direct reversal of the New York policy expressed in *Matter of N. Y. and Brooklyn Bridge* (1894) 75 Hun. 558, 27 N. Y. Supp. 597 and *Simar v. Canady* (1873) 53 N. Y. 298. The case accepts the view stated in *Moore v. Mayor* (1853) 8 N. Y. 110. The attempt of the court in the principal case to distinguish the case at bar from that of the *Brooklyn Bridge* case is futile and unconvincing.

All authorities agree that when land is taken by the right of eminent domain, it is not necessary to make the wife a party to the proceeding, as her inchoate dower is inferior to the right of the state to take land for public purposes, and when it is so taken the inchoate dower is extinguished. *Venable v. Wabash Western R. Co.* (1893) 112 Mo. 103, 20 S. W. 493; 1 Nichols, *Eminent Domain* (2nd ed. 1917) sec. 12; 1 Washburn, *Real Property* (5th ed. 1887) pp. 577-582. There is conflict, however, as to whether the wife is entitled to share in the proceeds of the award. The question has been adjudicated in but a comparatively few jurisdictions the majority of which hold that she has no right to share in the award. *Moore v. Mayor,* supra; (dicta) *Venable v. RR Co.,* supra; *Flynn v. Flynn* (1898) 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98; *McCullough v. St. Edwards Electric Co.* (1917) 101 Neb. 802, 165 N. W. 157; *Long v. Long* (1919) 99 Ohio St. 330. 124 N. E. 151, 5 A. L. R. 1343; *Salvatore v. Fuscellaro* (R. I. 1933) 166 Atl. 26, and the principal case. New Jersey is in the vanguard for the minority holding which maintains that the inchoate right of dower attaches